SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 668 25

SUTPHEN ESTATES, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OPPOSING JURISDICTION

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Counsel for Warner Bros. Pictures, Inc., et al.

J. ALVIN VAN BERGH,
HAROLD BERKOWITZ,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 668

SUTPHEN ESTATES, INC.,
Petitioner-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WARNER BROS. PICTURES, INC., ET AL.,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT, PURSUANT TO RULE 12, PARAGRAPH 3, OF THE REVISED RULES OF THIS COURT, BY WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION AND WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, IN OPPOSITION TO JURISDICTION.

Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, pursuant to Rule 12, paragraph 3 of the Revised Rules of this Court, submit the following state-

ment of the matters and grounds which make against the jurisdiction of this Court asserted by the Appellant.

Facts

Warner Bros. Pictures, Inc. (herein called Warner) produces motion pictures and owns corporations engaged in various phases of the motion picture business, including distribution and exhibition. It owns all the stock of Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation.

Appellant is the lessor of a theatre property in New York City known as the Strand Theatre. The property is leased to the subsidiary of a subsidiary of Warner, and the lease is guaranteed by Warner. The lease, which expires on December 31, 2026, is not in default and it is not contended that any default is threatened.

At an earlier stage of this litigation, the three-judge District Court handed down an opinion, 66 F. Supp. 323, and entered a decree, 70 F. Supp. 53, which this Court affirmed in part and reversed in part, 334 U.S. 131. After further proceedings, the District Court handed down an opinion, 85 F. Supp. 881, and entered a decree dated February 8, 1950. On a second appeal, this Court affirmed that decree without opinion, 339 U.S. 974.

The decree of February 8, 1950 required, among other things, that each theatre-owning defendant should submit a plan "for the ultimate separation of its distribution and production business from its exhibition business" and that such plan "provide for the completion of such separation within three years from the date of entry of this decree."

After lengthy negotiations the Government and Warner agreed upon a Consent Judgment. This Judgment required that Warner should submit to its stockholders a Plan of Reorganization under which all of the theatre assets would

be transferred to a New Theatre Company, and all of the production and distribution assets would be transferred to a New Picture Company, and the New Companies would distribute their common stock pro rata to the stockholders of Warner Bros. Pictures, Inc., which thereupon would be dissolved. The reorganization must be completed within twenty-seven months. The Judgment provided that the two New Companies should be operated wholly independently of one another, and should have no common directors, officers, agents or employees, and enjoined each company from attempting to control or influence the business or operating policies of the other by any means whatsoever.

Before the proposed Consent Judgment was presented to the Court, Appellant moved for leave to intervene upon the ground that the Plan of Reorganization would destroy Warner's guarantee of its lease, and argument on this motion was had at the same time as the hearing on the Consent Judgment. Upon the argument Appellant stated, "It may be that we are here prematurely, but it seemed to us important to bring to the attention of the Court at our earliest opportunity the situation that we are confronted with."

Appellant requested the District Court to provide a "judicially ascertained equivalent" for the Warner guarantee, which should include guarantees by both the New Picture and the New Theatre Company.

It appeared at the hearing that the New Theatre Company would assume all the obligations of Warner relating to theatre assets, including the guarantee of Appellant's lease. Appellant's counsel, however, argued, "* * * I do not have the equivalent of the guarantee we now have, when we are asked to take the guarantee of the theatre company only." Counsel for the Government, opposing the motion to intervene, argued that the guarantee of the New Theatre Company would be adequate protection. As to Appellant's

request that the New Picture Company also guarantee the lease, counsel for the Government stated, "Now we are unalterably opposed to that because the very purpose of this judgment is to effect a complete separation of the picture company from the exhibition interests. To put the picture company in the position of a guarantor of a theatre is to give it an interest in the success of that theatre and to give it an interest in the exhibition business." It was pointed out that presumably many such guarantees would be involved. Counsel for Warner, likewise opposing the motion, argued that the guarantee of the New Theatre Company would be adequate.

The Court denied Appellant's motion for leave to intervene and the Judgment in the form consented to by the Government and the Warner defendants was signed and entered.

The Judgment contained a provision that it would be of no force and effect unless the proposed reorganization was approved by the Warner stockholders within ninety days. Accordingly a Plan of Reorganization, as above described, was prepared for approval by the stockholders. The necessary proxy statement was prepared and submitted to the Securities and Exchange Commission, and sent to approximately 27,000 stockholders. At the stockholders meeting, the Plan of Reorganization was approved by a vote of 5,079,833 shares in favor, and 41,579 against.

Thereupon, pursuant to the provisions of the Consent Judgment, the Court entered an order severing and terminating the litigation as against the Warner defendants.

No Appeal Lies from the Order Denying Appellant's Motion for Leave to Intervene. The Questions Presented Are Not Substantial.

None of the three cases cited by appellant supports its contention that this Court has or should take jurisdiction to review the Order herein.

In *United States* v. *California Canneries*, 279 U.S. 553, Armour and Co., after entering into a contract to buy canned fruit from California Canneries, consented to a decree in a government anti-trust suit under which Armour was prohibited from engaging in the business of selling canned fruit. Canneries moved for leave to intervene, asserting that the consent decree destroyed its contract. The trial court's decision denying the motion was reversed by the Court of Appeals. The case ultimately came to this Court which held that the Court of Appeals had no jurisdiction since, under the Expediting Act, appeals must be taken direct to the Supreme Court. In the course of its opinion this Court pointed out that the Court of Appeals had ignored "the decisions which hold that an order denying leave to intervene is not appealable. In re Cutting, 94 U.S. 15; Credits Commutation Co. v. United States, 177 U.S. 311; Ex Parte Leaf Tobacco Board of Trade, 222 U.S. 578, 581; In re Engelhard, 231 U.S. 646; City of New York v. Consolidated Gas Co., 253 U.S. 219; New York v. New York Telephone Co., 261 U.S. 312. * * *"

In *United States* v. *Paramount Pictures, Inc., et al.*, 334 U.S. 131, 177-178, the orders of the District Court denying leave to intervene were affirmed, but this Court expressly refrained from ruling whether it had jurisdiction to hear the appeals from such orders.

In Missouri-Kansas Pipe Line Co. v. *United States*, 312 U.S. 502, the consent decree contained a specific provision

granting petitioner-appellant a right of intervention. This case was distinguished on that specific ground when it was cited in *Allen Co.* v. *Cash Register Co.*, 322 U.S. 137, 142.

The present appeal is similar to an appeal taken from the denial of a previous application for leave to intervene in this litigation. It will be recalled that prior to the contested decree which was reviewed by this Court in *United States* v. *Paramount Pictures, Inc., et al.*, 334 U.S. 131, the parties had consented to a decree which contained provision for the arbitration of disputes arising in the motion picture industry (See 334 U.S. at p. 176). In *St. Louis Amusement Co.* v. *United States*, 326 U.S. 680, the appellants had sought leave to intervene in the *Paramount* case in the District Court, asserting they were injured by the operation of the arbitration system. The relief they sought was, among other things, that the consent decree be vacated insofar as it had created the arbitration system. Leave to intervene was denied and an appeal to this Court was docketed. This Court dismissed the appeal for want of jurisdiction, citing *United States* v. *California Canneries*, 279 U.S. 553, 556 and cases cited; *Allen Co.* v. *Cash Register Co.*, 322 U.S. 137, 142.

Similar appeals were taken from denials of motions to intervene in this case in opposition to the Consent Judgment of Paramount Pictures, Inc. This Court affirmed the orders denying intervention. *Ball, Trustee* v. *United States*, 338 U.S. 802; *Partmar Corporation* v. *United States*, 338 U.S. 804.

The authority of the *St. Louis Amusement Co.* case, *supra*, and of the cases there relied upon by the Court and the authority of the *Ball* and *Partmar* cases, thus clearly require that the instant appeal be dismissed for want of jurisdiction and because no substantial question is presented requiring review by this Court.

WHEREFORE, the appellees Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation respectfully ask that the appeal herein be dismissed.

April 5th, 1951.

Respectfully submitted,

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Warner Bros. Pictures
Distributing Corporation,
Warner Bros. Circuit
Management Corporation.

(S.) J. ALVIN VAN BERGH,
(S.) HAROLD BERKOWITZ,
Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

SUTPHEN ESTATES, INC.,
Petitioner-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WARNER BROS. PICTURES, INC., ET AL.,
Defendants-Appellees

PROOF OF SERVICE

Service of the foregoing Statement In Opposition To Jurisdiction Of The Supreme Court Of The United States and the receipt of a copy thereof are hereby acknowledged this 5th day of April, 1951.

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